SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-463

JOSEPH M. KADANS, *Appellant,*

v.

JON R. COLLINS, ET AL., as members of the Nevada Supreme Court

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Appeal from the United States Court of Appeals for the Ninth Circuit

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MOTION TO DISMISS APPEAL FOR WANT OF JURISDICTION AND BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

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JON R. COLLINS *et al.*, members of the Nevada Supreme Court and appellees herein, move to dismiss the appeal for want of jurisdiction, and, treating the appeal as a petition for certiorari as now required by 28 U.S.C. § 2103, submit that certiorari should be denied.

OPINIONS BELOW

The opinion of the district court (J. S., App. A) is not reported. The memorandum opinion of the court of appeals (J.S. 1) is reported at 441 F.2d 657.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 1971. A timely petition for rehearing was denied on June 23, 1971. A notice of appeal to this Court was mailed to the clerk of the court below on August 22, 1971 (J. S. 3), and the case was docketed here on September 13, 1971. The jurisdiction of this Court is invoked, see J. S. 3, under 28 U.S.C. § 1253.

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction on appeal to review a judgment rendered by a United States court of appeals that did not hold any state statute to be invalid as repugnant to the Constitution, treaties or laws of the United States, but to the contrary sustained its validity.

2. Whether a state may, consistently with the Constitution of the United States, require as a prerequisite to taking its bar examination that the applicant shall have received a degree from a law school that has been approved by the Committee on Legal Education of the American Bar Association.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Section 1 of the Fourteenth Amendment is sufficiently familiar to the Court as not to require quotation.

2. Section 1253 of Title 28, United States Code, provides as follows:

> **"§ 1253. Direct appeals from decisions of three-judge courts**
>
> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order

granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

3. Section 1254(2) of Title 28, United States Code, provides in pertinent part as follows:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

* * * * *

"(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented."

4. Section 2103 of Title 28, United States Code, as amended in 1962, provides as follows:

"§ 2103. Appeal from State court or from a United States court of appeals improvidently taken regarded as petition for writ of certiorari

"If an appeal to the Supreme Court is improvidently taken from the decision of the highest court of a State, or of a United States court of appeals, in a case where the proper mode of a review is by petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken. Where in such a case there appears to be no reasonable ground for granting a petition for writ of certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double costs."

5. Rule 51(6) of the Nevada Supreme Court Rules, provides as follows:

> "An applicant for examination for a license to practice as an attorney and counselor at law in this state shall: * * *
>
> "6. Have received a degree of bachelor of laws, or an equivalent law degree, from a law school approved by the committee on legal education and admissions to the bar of the American Bar Association, and shall present evidence of the same."

STATEMENT

The appellant Kadans alleges that he is a member of the bar in good standing in Maryland and Michigan; that he has been admitted to practice in three United States courts of appeals and in this Court; that he is the author of a number of legal texts and has taught law; and that he "considers that he falls within the dictionary definition of a jurist" (Cmplt., ¶¶ 2-4).

He complains that, since he is unable by reason of Rule 51(6) of the Nevada Supreme Court, just quoted, to take the Nevada bar examination, he is being "deprived of the privilege of practicing his profession," to his damage in excess of $10,000 (*id.*, ¶ 7); and he alleges that Rule 51(6) is unconstitutional in violation of both the due process and the equal protection clauses of the Fourteenth Amendment because it is arbitrary and unjust (*id.*, ¶ 6).

The appellant Kadans accordingly prayed for declaratory and injunctive relief and asked that a district court of three judges be convened to consider his constitutional challenge.

The district judge refused to convene a three-judge court because no state statute was alleged to be uncon-

stitutional, and on the merits dismissed the complaint for failure to state facts on which relief could be granted (J.S., App. A).

On appeal, the court below affirmed *per curiam* on the basis of its own prior ruling in *Hackin* v. *Lockwood,* 361 F.2d 499, certiorari denied, 385 U.S. 960 (No. 577, O.T. 1966); that decision sustained a substantially identical rule promulgated by the Supreme Court of Arizona, which also required graduation from an A.B.A.-approved law school as a prerequisite to taking the bar examination.

Following denial of rehearing, the appellant Kadans noted an appeal to this Court, and simultaneously sought, in a companion case (No. 71-464), mandamus against the district judge and against the chief judge of the circuit because of their failure to convene a three-judge court.

A separate brief in opposition is being filed in No. 71-464.

ARGUMENT

I. THE APPEAL MUST BE DISMISSED FOR WANT OF JURISDICTION

Inasmuch as the Nevada Supreme Court Rule that is in question had the force of law, having been enacted pursuant to a statute empowering that court to make its own rules governing the State Bar (Nevada Revised Statutes, § 2.120), Rule 51(6) constitutes a "State statute" within the meaning of 28 U.S.C. § 1254(2) because it was legislative in nature. See *Lathrop* v. *Donohue,* 367 U.S. 820, 824-827, which is conclusive on that point. True, the *Lathrop* case construed 28 U.S.C. § 1257(2), dealing with appeals from state courts, but surely the

meaning of "a State statute" for purposes of this Court's appellate jurisdiction is not varied by the happenstance of whether the appeal sought to be lodged here is taken from a state court of last resort or from a United States court of appeals.

Consequently, since Nevada Supreme Court Rule 51(6) constitutes a state statute for purposes of review by this Court, the contrary reasoning of the district court on that issue (J. S. App. A) cannot be supported.

But—an appeal from a United States court of appeals under 28 U.S.C. § 1254(2) lies only when the state statute has been held "invalid as repugnant to the Constitution, treaties, or laws of the United States." The terms of the cited provision are perfectly clear, from which it necessarily follows that, since here the state enactment was sustained, Kadans' appeal from the Ninth Circuit's judgment must be dismissed for the want of jurisdiction.

It is perhaps unnecessary to add that the jurisdictional provision invoked by Kadans, 28 U.S.C. § 1253, see J.S. 3, is wholly unavailing; that concerns only "Direct appeals from decisions of three-judge courts." The title dispels any ambiguity lurking in the language of the text, "in any civil action * * * required by any Act of Congress to be heard and determined by a district court of three judges," see *Maguire* v. *Commissioner*, 313 U.S. 1, 9-10; *F.T.C.* v. *Mandel Brothers*, 359 U.S. 385, 388-389, and the settled practice here establishes beyond question that, since the case was not in fact heard below by a district court of three judges, a direct appeal to this Court will not lie. *Mengelkoch* v. *Welfare Comm'n.*, 393 U.S. 83; *Wilson* v. *Port Lavaca*, 391 U.S. 352; *Schackman* v. *Arnebergh*, 387 U.S. 427.

II. TREATING THE APPEAL PAPERS AS A PETITION FOR A WRIT OF CERTIORARI. CERTIORARI SHOULD BE DENIED

What we have just said, however, is not fatal to consideration of Kadans' application for review, because, by reason of the 1962 amendment to 28 U.S.C. § 2103 (*supra*, p. 3), an appeal "improvidently taken from the decision * * * of a United States court of appeals, in a case where the proper mode of a review is by petition for certiorari * * * shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken"; see *El Paso* v. *Simmons*, 379 U.S. 497, 501-503. Therefore, treating the appeal as a petition for certiorari, it is timely because filed within 90 days of the denial of rehearing below. 28 U.S.C. § 2101(c).

On the merits, however, certiorari should be denied, as the substantive question presented does not warrant further review.

First. This Court said in *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 239:

> "A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to pracice law. * * * Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory."

What the court below said in its earlier decision regarding Arizona, and on which it rested its ruling

here, deserves quotation (*Hackin* v. *Lockwood,* 361 F. 2d 499, 503-404; footnotes omitted):

> "In determining whether Arizona's educational requirement is arbitrary, the fact that Abraham Lincoln and Dean Roscoe Pound had no, or little, formal legal schooling is interesting, but not conclusive. * * *
>
> "Roscoe Pound (the example named by appellant herein as one without *formal* legal education) was himself a member of the 1913 Committee of the American Bar Association that induced the Carnegie Foundation to survey all the law schools of this country, and to evaluate the matter of admission to the bar in the various states of the entire country. Published early in 1921, it had a tremendous effect on the adoption of the American Bar Association's accreditation rule, adopted later in 1921. This was approved by the Association of American Law Schools. In urging its adoption, the Honorable Elihu Root described the vast complications of the then statutory enactments (increased many fold since 1921) as 'a wilderness of laws and a wilderness of adjudications that no man can follow—[which] require not less but more ability; not less but more learning; not less but more intellectual training in order to advise an honest man as to what his rights are and in order to get his rights for him.'
>
> * * * * *
>
> "But whatever the various states, in their respective wisdom, may require before allowing the taking of bar examinations—so long as they are applicable to every citizen alike, it should be of no concern to the federal courts."

This Court thereafter denied review, 385 U.S. 960 (No. 577, O.T. 1966), and certainly nothing since then has added the slightest substance to the contention that

requiring graduation from an approved law school as a prerequisite to taking the bar examination transcends constitutional limitations.

Second. Nor does Kadans' position gain stature on reappraisal.

In requiring graduation from a law school that has been approved by the Committee on (now actually Section of) Legal Education of the American Bar Association as a prerequisite even to taking the bar examination, Nevada does not stand alone. For the fact is that most states require graduation from an approved law school, some from those approved by the American Bar Association, some from those approved by the American Association of Law Schools, some from those approved by the highest state court; some states accept alternatives. See *1970 Review of Legal Education,* published by the Section of Legal Education and Admissions to the Bar of the A.B.A., at pp. 50-54.

No less than 17 states—Alaska, Arkansas, Idaho, Illinois, Indiana, Louisiana, Maine, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, South Dakota, West Virginia, and Wisconsin—do not permit any alternative to their requirement of graduation from an A.B.A.-approved law school.

"We call that action reasonable," said Mr. Justice Brandeis in *Quaker City Cab Co.* v. *Pennsylvania,* 277 U.S. 389, 403, 406, "which an informed, intelligent, just-minded, civilized man could rationally favor."

Accordingly, there is nothing even remotely unreasonable in the preference of a third of the fifty states for a bar examination applicant who has graduated from a law school that meets the requirements imposed

by an informed body of the legal profession—a body, it should be noted, that has never sought to limit the number of those desiring to enter its ranks, but, to the contrary, has assiduously labored over many decades to enhance the educational qualifications required of persons who undertake the responsibility of protecting a client's confidences, aspirations, property, means of livelihood, freedom, and, it may be, his very life.

Nothing in the Constitution restricts a state from establishing qualifications for admission to its bar, or for admission to an examination for such admission, that, as here, are reasonable; that, as here, are relevant to a high standard of professional attainment; and that, as here, are required of all applicants. It is possible that alternative requirements might reflect a wiser policy. But Nevada, along with 16 other states, "has made its choice. To disturb it would be beyond the power of this Court." *Law Students Research Council* v. *Wadmond,* 401 U.S. 154, 167. And of course there is not the slightest suggestion in the present appeal papers that Nevada has displayed any interest whatever in Kadans' associational ties.

It could conceivably be objected that reliance on any outside group's appraisal and approval involves an inescapable degree of delegation to disinterested experts. But quite the same stricture could be leveled at this Court's Rule 5: The basic requirement for admission to this Court's bar is prior admission to the bar of, i.e., prior approval by, the highest courts of the several states and possessions. Some states have higher standards, some lower; but surely it does not follow that Rule 5 therefore involves a denial of equal protection.

Third. Kadans argues (J.S. 6-9) that Nevada Supreme Court Rule 51(6) "tends to restrict free move-

ment of lawyers wishing to change residence from one state to another and are thus prevented from pursuing their occupations when they move from one part of a country to another."

Contrary to his contention, however, Rule 51(6) is as fully applicable to individuals who have lived all their lives in Nevada as it is to those who move there after having practiced elsewhere. Kadans was barred from taking the Nevada bar examination, not because he had not completed a prescribed period of residence in that state, but because he lacked the educational qualifications that Nevada required as a condition precedent.

That circumstance renders wholly inapplicable the two three-judge court decisions on which he relies (J. S. 8, 9), *Keenan* v. *Board of Law Examiners,* 317 F. Supp. 1350 (E.D. N.C.), and *Webster* v. *Wofford,* 321 F. Supp. 1259 (N.D. Ga.), both of which struck down residence requirements that were wholly unrelated to legal education. Thus, assuming for present purposes the correctness of both those cases, neither one has the slightest bearing on the present litigation.

It is true that Kadans, who was admitted to the bar in both Maryland and Michigan—his other admissions were derivative and did not require any examination (*supra,* p. 4)—now finds himself unable to meet the qualifications that Nevada requires for permission to take its test. But, along with Mr. Justice Holmes (*Truax* v. *Corrigan,* 257 U.S. 312, 342, 344), we should guard against "the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several states."

For, indubitably, nothing in that Amendment prevents Nevada—along with 16 other states, see p. 9, *supra*—from imposing on those seeking admission to its bar higher or different standards of educations' excellence and attainment than those that appear adequate to the remaining states of the Union.

CONCLUSION

The appeal must be dismissed for want of jurisdiction. Treating the appeal papers as a petition for certiorari, as now required by 28 U.S.C. § 2103, certiorari should be denied.

Respectfully submitted.

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